

~~best experts are often lost because of the lack of this proper acknowledgement. Bureaucracy should not be allowed to jeopardise the proper and efficient administration of justice.~~

~~The purpose of medicine is to maintain the patient in the best of health, to overcome the disease or injury, and to prolong his life span. The purpose of law is to maintain peace and order in the community, to respect the human personality through human rights, and to provide equality of opportunity. To achieve these purposes, medicine emerges from the laboratory by the scientific process; law emerges from the community by the process of experience. 'People follow medicine, law follows people.' Both professions are thus committed to safeguard the ultimate and common purpose - humanity.~~

~~If at any stage of this brief review I have been instructive, it is merely incidental; If I have been constructive it is quite essential, and if I have been provocative, it is absolutely intentional.~~

SOME GENERAL CONSIDERATIONS ON THE DEATH AND DONATION DUTY ACT 1973

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ON 1st January 1974, the Death and Donation Duty Act, 1973 came into force. Its stated object is 'to provide, in place of the Succession and Donation Duties Ordinance, for the imposition of a duty on property passing on death or transferred gratuitously by way of *inter vivos* disposition, and for the collection thereof'.

The Act is based on the draft law which was prepared by a Commission set up in September 1971. The Commission was chaired by Mr. Justice Agostino Gauci Maistre, and had the following members: Professor Felice Cremona, Dr. Joseph Borg (later on substituted by Dr. Carmel Testa), Architect André Zammit, Architect Joseph Leone Ganado, and Mr. Edwin Vella.

COMMISSION'S TERMS OF REFERENCE

The terms of reference of the Commission were:

'To prepare a new draft law levying Succession and Donation

Duties with special reference to the following requirements:

(i) The simplification and tightening up of the machinery provisions of the law.

(ii) The updating in general of the provisions of the law and, in particular, those connected with valuation.

(iii) An increase in the limit of exemption in the case of minor transmissions.

(iv) The introduction of any changes that may be required in order to achieve an equitable and fair distribution of the tax burden on individual members of the community: provided, however, that the yield to revenue as arising out of the current provisions of the law be not adversely affected.

(v) The creation of a Board to take cognisance of appeals on points of law and of fact against assessments raised by the Department.

(vi) Reference to Her Majesty's Court of Appeal to be restricted to appeals on points of law against decisions delivered by the said Board'.

SOURCES AND TITLE OF NEW LAW

In its Report filed in June 1972, the Commission stated that the major source of its draft law was the 1918 Succession and Donation Duties Ordinance itself, and that reference was made to the appropriate laws existing in Italy, the United Kingdom, Canada, Cyprus, and South Africa, and that many of the machinery provisions of the draft law were obtained from the Malta Income Tax Act, 1948.

The change in the title, from 'Succession and Donation Duties' to 'Death and Donation Duty', was proposed by the Commission for two reasons. It was argued that since both the 'estate duty' and 'succession duty' aspects of the duty were being retained, neither of those terms should be used to describe the death duty aspect of the law, and the basic term of 'Death Duty' should be adopted. It was also stated that the singular term 'Duty' was chosen to emphasise that although the tax under the Act was leviable following death or donation or consolidation of the usufruct with the *nuda proprietas*, and although it is calculated according to the provisions of two separate tax schedules, it is intrinsically one single duty which is chargeable in the case of transfer of property not under an onerous title. It was further argued that although the case of consolidation of usufruct and *nuda proprietas* does not fit exactly the title

suggested by the Commission, in the vast majority of cases consolidation may be said to happen on death because it took place following the death of the usufructuary.

METHODS OF TAXATION

The 1918 Ordinance referred to estate duty, succession duty, legacy duty, donation duty, consolidation duty, and duty payable on the termination of emphyteutical grants. The 1973 Act refers to only one duty, death and donation duty, but the two methods of taxation found under the 1918 Ordinance, one based on the amount of property involved in the transfer or transmission without regard to the number of beneficiaries and to their relationship to the person possessing the property, and another based on that relationship and on the amount acquired by each beneficiary and not on the total amount, are both retained under the 1973 Act. The Act thus charges one duty under two separate schedules applicable equally to property acquired on death, to donations, and to consolidations of usufruct and *nuda proprietas*.

However, in the methods of taxation under the 1918 Ordinance and the 1973 Act there is a radical difference in the manner of computing the duty. Under the former law, the rate of duty based on the value of the property was applied to the entire value and therefore a change in the rate brought about by a higher value meant that the entire amount was charged at the higher rate. The 1973 Act, while retaining the principle of progressive rate of taxation, does not apply the higher rates to the entire amount but the graduated rates continue to apply in relation to their relevant portions of the value of the chargeable transmission. Furthermore, under the 1973 Act, the rates of the Second Schedule are graduated not only in relation on the basis of the relationship between the person acquiring and the person from whom the property is acquired, but also in relation to the amounts involved.

The exemptions granted under the 1918 Ordinance and under the 1973 Act differ in many respects but the most significant differences refer to the limits and to the effects on the exemptions when the values exceed the limits. Thus, under the former law, transmissions happening on death below £M1,000 in value were exempt from all duty, but in the case of a transmission over that limit, the exemption applicable to the first £M1,000 was lost and the entire amount was charged to duty. Under the 1973 Act, in all transmissions happening on death, the first £M3,000 are exempt from duty and remain

exempt whatever the values of the transmissions.

SITUS OF PROPERTY AND DOMICILE

The Commission set up to prepare the draft law acknowledged that problems connected with the determination of the 'situs' of property and of related rights are on the increase because of the 'internationalisation of life', and that it is desirable that the law deals with the matter more fully than the 1918 Ordinance did. The Commission stated that 'it borrowed rather heavily from the law of Canada' in the rules it suggested for the determination of the 'situs' of specific categories of property and related rights, and in default of specific rules applicable to other property and related rights, the Commission suggested that the property or right is to be deemed to be situated in the place of the last domicile of the person from whom the chargeable transmission originated.

Under the 1973 Act, domicile of the beneficiary remains a relevant consideration in the case of property situated outside Malta and of related rights, but a major change is effected in respect of the concept of domicile. The Commission took the stand that the notion of domicile obtaining in Malta in accordance with the principles of Private International Law should be applied to the law on death and donation duty in the same way that it is applied to other laws. The Commission, therefore, did away with the 'deeming' provisions of the 1918 Ordinance by virtue of which persons born and residing in Malta and persons who took up their permanent abode in Malta were deemed to be also domiciled in Malta.

CONSOLIDATIONS

A significant measure is the elimination from the new law of the duty which was chargeable under the 1918 Ordinance in certain instances on termination of emphyteutical grants. The Commission held that the relevant provisions of the Ordinance were rather obscure and that the amount of revenue yielded did not warrant the amount of work involved. Moreover, the Commission did not think it logical to tax the reversion of the *Utile* to the *Directum Dominium* when the happening of the contingency must have already affected the consideration paid to the owner when he made the emphyteutical grant.

On the other hand, the consolidation of the Usufruct with the *Nuda Proprietas* has been retained under the 1973 Act. While the general principle is laid down that the consolidation is taxable in all

circumstances except where it takes place for an appropriate consideration, the two exceptions of the 1918 Ordinance have been maintained: that duty is not charged when consolidation takes place in the hands of the person who constituted the usufruct, and when consolidation takes place on the termination of a usufruct established by law.

VALUATION OF PROPERTY, USUFRUCT AND OF CONSOLIDATIONS

The Commission was specifically required to update in particular the provisions of the law relating to the valuation of property and related rights.

A major problem in this respect is the valuation of immovable property on lease the rent of which is statutorily controlled and consequently below the commercial value. To establish the value of the property without taking into account the restricted yield would be unrealistic, and to establish the value on the basis of the yield only would also be unrealistic. The Commission confessed that in this matter it did not find much help in the legislation of other countries, which generally refer to the market value of the asset. It was not found possible to suggest a more specific formula than that based on the one found in the 1918 Ordinance: that the value of the full ownership of any property, movable or immovable, on the relevant date shall be 'the average price which such property would fetch if sold on the open market on that date', with, however, the additional rider, 'due regard being had to all the circumstances affecting such property'. Controlled rent would presumably be one of the relevant circumstances to be taken into account.

While the valuation of usufruct for life is still based on a proportion of the value of full ownership of the property subject to usufruct, the method under the 1918 Ordinance of taking one-fourth of the value if the usufructuary was over forty years and one-half of the value if he was under forty years, is replaced by a graduated percentage related to the age of the usufructuary and starting with ten per cent when the usufructuary has completed seventy years of age and rising to seventy per cent when he has not completed twenty years of age. In this matter the Commission based itself on the more recent life expectancy tables prepared by the Central Office of Statistics.

The 1973 Act makes a radical change in the method of valuation of the consolidation of the usufruct and the *nuda proprietas*. Under the 1918 Ordinance, in the case of consolidation taking place in

the hands of the bare owner, since one had to take the full value of the property at consolidation and deduct the value of the *nuda proprietas* at the commencement of the usufruct, any increase in the value of the *nuda proprietas* between the two dates was also taxed. The Commission argued that since the *nuda proprietas* already belonged to the person in whose hands consolidation was taking place, the method was unfair because at consolidation, the person acquired further only the right of enjoyment of, or of income from, the thing and it was the value of that right which should be brought to charge. Therefore, under the 1973 Act, the value of consolidation is taken to be the value of the usufruct at the time of consolidation worked out on the value of full ownership of the property at that time but based on the relative percentage proportion related to the age of the usufructuary at the time of the commencement of the usufruct.

In the method of valuation of consolidation which takes place in the hands of the usufructuary, the 1973 Act also makes a significant change in that from the value of full ownership of the property at the time of consolidation, one has to deduct the value of the usufruct but not that obtaining at the time of its commencement as was the case under the 1918 Ordinance, but the value at the time of consolidation and established 'as if the usufruct had devolved on the usufructuary on the date of the consolidation'. Consequently, since at the age of commencement of usufruct the age of the usufructuary must be lower than that at consolidation, the proportion of the value of the usufruct to the value of the full ownership would be higher at commencement than at consolidation, and inversely, the proportion of the value of the *nuda proprietas* would be higher at consolidation.

APPEAL FACILITIES

The simplification and tightening up of 'the machinery provisions' of the law was the first requirement referred to in the Commission's terms of reference, and the Commission considered the 1918 Ordinance provisions regarding assessments, objections, and appeals to be the main machinery provisions 'which radically required amendment and modernisation'.

The fifth and sixth requirements detailed in the Terms of Reference stipulated the creation of a Board to take cognisance of appeals against assessments on points of law and of fact and the right of appeal from the Board's decisions on points of law only to

the Court of Appeal. The Commission read into these requirements a clear reference to the appeal procedure obtaining under the Malta Income Tax Act, 1948 and the Commission declared that, in formulating its proposals in this respect, it 'borrowed heavily' from the Income Tax Act.

Under the Death and Donation Duty Act, the Board of Special Commissioners and the Court of Appeal have power to increase an assessment. An identical power exists in Income Tax appeals. The Commission, however, added a qualification which is not expressly found in the Income Tax Act but which the Commission acknowledged to have been established in Income Tax cases: any increase ordered in an assessment may refer only to those heads of the decision on the assessment against which an appeal is entered.

Although the Income Tax Act does not specify the qualifications of the Chairman and substitute Chairman of the Board of Special Commissioners for Income Tax, the practice has always been to appoint serving Magistrates to the posts. The Commission thought it advisable for the law to specify that the Chairman and substitute Chairman of the Board of Special Commissioners for Death and Donation Duty shall be Magistrates or retired Magistrates.

Security of tenure of Office of the Special Commissioners should, according to the Commission, be spelt out in the law, and the Commission suggested that every Special Commissioner should hold office for a period of three years. The 1973 Act, however, provides that every Special Commissioner shall hold office for such period as may be specified in his appointment. The position is therefore different from that of the Special Commissioners for Income Tax who hold office during the President's pleasure. Furthermore, the Death and Donation Duty Act does not contain the provision obtaining in the Income Tax Act, that the President 'may, without assigning any reason, revoke the appointment of any Special Commissioner and he may appoint new Special Commissioners whenever necessary'.

The above general considerations are only but a few of the manifold points of interest raised by the Death and Donation Duty Act, 1973 and, it is hoped, would help to encourage further and more detailed studies which the provisions of the Act merit.